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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 752

EDWARD J. GILL, FRANK C. MENKING, JAMES A. HILL, WILLIAM BRITTON, DONALD E. WILSON, GEORGE P. ELY, ALBERT A. PEARCHER, JOSEPH C. HOENETCK, JOHN J. SCHUBERT, WILBERT T. MAYER, HERMAN C. CARLSON, CLINTON O'SHELL, SR., WALTER F. WEIR and JOHN P. DAUGHERTY,

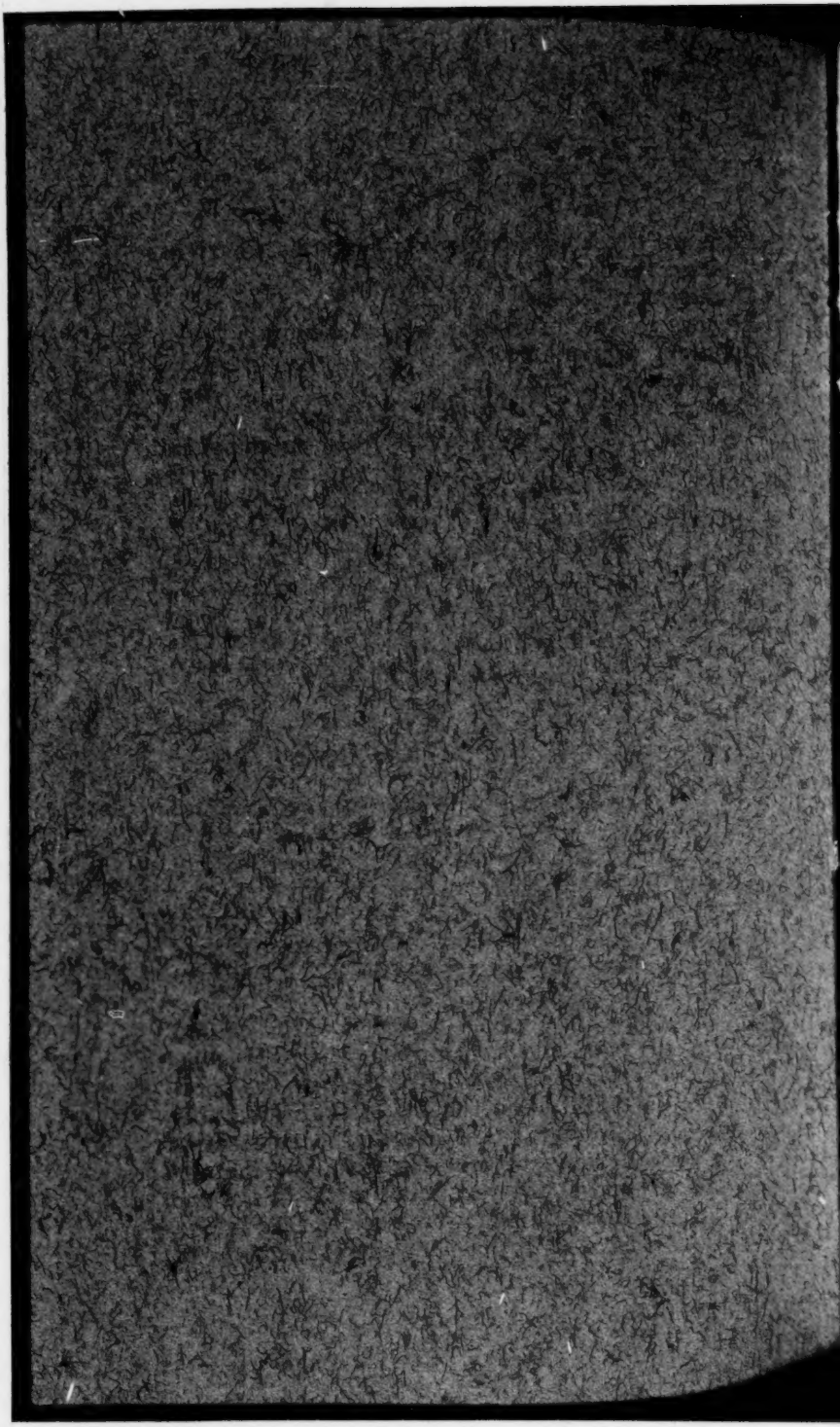
Petitioners,

vs.

MESTA MACHINE COMPANY, *Corporation.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Edward J. Gill, et al.,
Pro Se.



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SUPREME COURT OF THE UNITED STATES

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No. 752

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Petitioners,

vs.

MESTA MACHINE COMPANY, A CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Basis on Which It Is Contended That This Honorable Court Has Jurisdiction

Jurisdiction of this Honorable Court exists by virtue of the Act of Congress of June 25, 1938, c. 676; 52 Stat. 1060; 29 U. S. C. A. pars. 201-219, as amended, and section 240 as amended, Judicial Code, 28 U. S. C. A. 347.

Date of Circuit Court's Judgment and Opinion

The Circuit Court rendered its judgment and opinion on January 21, 1948.

Statement of Case

All plaintiffs are employed in the machine shop of defendant corporation. During the period covered by the claim, all were engaged in activities admittedly in interstate commerce. (Admitted in defendant's answer.)

United States District Court jurisdiction of the cause of action and parties thereto was admitted.

Although in the original answer (par. 6th) defendant avers that plaintiffs were paid in full all compensation due them, and that there is no money owing to plaintiffs, by stipulation (Appendix to Appellee's Brief, Vol. I, page 6b) it is admitted that plaintiffs worked overtime and were not compensated therefor. The exact number of overtime hours and amount of compensation has not yet been established.

Defendant set up an affirmative defense to the claim (par. 5th, answer) averring that plaintiffs' work was "of such an executive and administrative character as exempts their employment by the defendant from the scope and effect of the Fair Labor Standards Act of 1938."

Sixty-two witnesses, including the fourteen plaintiffs, testified for plaintiffs, who also called as for cross-examination three of defendant's officers.

Defendant offered no witnesses or defense whatever, apparently relying entirely on the testimony of the witness Berg, who was examined extensively by defense counsel after being cross-examined by counsel for plaintiffs. The record consists of 993 pages; of these Mr. Berg's entire testimony covers 79 pages.

The testimony was only partially printed. The Circuit Court accepted the typewritten transcript of the testimony consisting of about 1000 pages in lieu of printing same.

Reference is therefore made to the said typewritten testimony.

This original transcript will disclose that Mr. Berg admitted the following:

A. The entire machine shop is a single department (Trial transcript 20).

B. There are no subdivisions of the machine shop (Trial transcript 20).

C. The plaintiffs have nothing to do with placing of machines in the shop (Transcript 23).

D. The scheduling of production is done by the superintendent and not by plaintiffs (Trans. 24-25).

E. On each of the three shifts of the twenty-four hour workday a "turn foreman" is in charge of the machine shop (Trans. 24).

F. Labor relations bargaining through union representation was carried on by Mr. Berg himself (Trans. 27).

G. The company never gave any instructions to plaintiffs concerning their duty or authority (Trans. 29-30).

H. The company never gave any instructions to plaintiffs regarding their activities during a labor relations election (Trans. 31).

I. Plaintiffs have nothing to do with hiring employees (Trans. 31).

J. Wage rates and increases are recommended by the superintendent but must be approved by an executive "wage committee" consisting of three officers of the company (Trans. 32).

K. The determination of replacements of machinery is made by top management without reference to plaintiffs (Trans. 34-35).

L. Selection of materials and specifications are determined by an engineering department (Trans. 36-37).

M. No "foremen meetings" were ever held with plaintiffs present (Trans. 38).

N. Policy meetings were held with the "turn foremen" (not plaintiffs) and superintendents (Trans. 38).

O. All plaintiffs had been employed in production work in the machine shop prior to being placed on salary (Trans. 38-39).

P. Defendant's "Exhibit A" indicating apparent subdivisions of the machine shop was only prepared especially for use in the trial and all the coloring and numbering of the facts thus marked were added only for the purpose of the trial (Trans. 64-65-66).

Q. That the plaintiffs' right to recommend dismissal of a helper was no greater than that of an operator or "journeyman" (Trans. 70-71).

R. That plaintiffs put in "thirty to forty hours a month" demonstrating the operation of machines in addition to "taking tools and jigs and other devices and plans and drawings to the machine operator" (Trans. 73).

S. Timing of jobs is done by the time study department and not by plaintiffs (Trans. 76).

T. Plaintiffs received from three to four hours supervision a day from the turn foremen (Trans. 85).

U. The "general foreman" is the foreman or "turn foreman" of the department (Trans. 85).

V. No manual of instructions was ever given to plaintiffs (Trans. 85).

All plaintiffs testified that they were not told that they were even given a job title as foreman when they were taken off their machines.

Statement of Case

It is admitted that for periods varying from two and one-half to five months prior to being placed on salary, plaintiffs performed exactly the same job duties on hourly rate, receiving time-and-one-half for overtime, shift differentials, and group bonuses as compensation. The only difference in status was that plaintiffs were placed on salary. IT IS ADMITTED THAT WHEN THIS CHANGE TOOK PLACE, THAT NO ADDITIONAL AUTHORITY WAS CONFERRED UPON PLAINTIFFS.

All of the plaintiffs testified that they performed work of a similar character to that performed by non-exempt employees ranging from a minimum of two hours per day to as much as eight hours per day. This testimony is corroborated by actual production employees and is NOT DENIED BY DEFENDANT.

Helpers and laborers in the machine shop were supervised by a shift "labor foreman" (Trans. 960-62-24), who was himself an hourly rated employee and therefore, not an executive under the terms of the regulations.

The work of machine operators in conjunction with plaintiffs, had to be approved by hourly rated inspectors.

All plaintiffs testified that they had no authority given them to hire, discharge, discipline, promote or demote or otherwise change the status of any employee; that they had no control over other men who were assigned to their group; that they had no authority or control over the scheduling of production; selection of materials, determination of cost or final approval of the production; that they were never called into any supervisory meetings, were never told anything concerning company policy with regard

to personnel or any other matter, that they were not required to and did not keep any merit ratings for any employees in their groups, that they were not instructed in any labor relations, or on the meaning of the term "grievance" and were not authorized to discuss or settle grievances of employees.

The record discloses that the earnings of hourly rated employees in the machine shop were higher than the earnings of plaintiffs.

After the close of hostilities in World War II, most of the plaintiffs were returned to their original jobs as machinists on the same machines from which they were removed.

In brief, the mechanical skills of all plaintiffs were employed during the war emergency to help expand and sustain production; the only jobs which were assigned to or performed by these plaintiffs were mechanical in nature, coupled with an obligation to help out less skilled men brought into the shop during an emergency. None of the plaintiffs was given authority over the personnel of the shop; they were on hand if needed by new employees, or to help in set-ups of jobs, or for advice on mechanical matters in connection with operation of machines—but for no other duties whatsoever.

The learned trial judge grouped all plaintiffs in joint findings and conclusions.

Although absolutely no evidence exists in the record to establish that 10 of the 14 plaintiffs had at any time actually recommended advancement or promotion of other employees, (see Trial Court's Findings of Fact No. 7); and although each plaintiff positively and affirmatively denied possessing any such authority, the learned trial judge finds that *all* plaintiffs possess this necessary element to

constitute them executives. This finding is affirmed by the Circuit Court.

Similarly, the 9th Finding of Fact by the learned Trial Court is absolutely unsupported as to 10 of the 14 plaintiffs, yet the Court held *all* plaintiffs "customarily and regularly exercised discretionary powers." Of course this element is just as essential as any of the other five characteristics set out in the Administrator's Regulation defining an executive: and despite the absence of proof or evidence of record to support the finding as to 10 plaintiffs, the Circuit Court affirms the District Court's finding.

The plaintiffs contend that the burden on the defendant is to establish the presence of *all* of the six elements as to *each* plaintiff in order to avoid overtime compensation.

Plaintiffs proved their case in the stipulation, *supra,* alone, by the admission that *all* worked overtime without compensation therefor.

Defendant rested its case at the conclusion of plaintiffs' testimony. No proof of the existence of *any* of the six elements referred to, as to *any* of the 14 plaintiffs was therefore established by affirmative proof of any kind by defendant.

Questions Presented

1. Did the Circuit Court correctly interpret the requirements of Sec. 213 (a) of the Wage and Hour Administrator's Regulation, 52 Stat. 1067, 29 U. S. C. A.?

2. Did the Circuit Court correctly find that "there was substantial evidence to support the findings of the learned trial judge" to the effect that all six characteristics of an "executive" were possessed by all fourteen plaintiffs?

3. Where it is stipulated of record that all plaintiffs worked overtime for which they were not compensated; and where no defense is offered affirmatively by defendant, is the Circuit Court correct in sustaining the findings and

conclusions of the District Court which were not supported by any evidence whatever as to some of the six elements characterizing an "executive"?

4. Where the trial judge refused to consider preferred testimony of union experts, to the effect that plaintiffs would not be considered by them as part of management, and absolutely no official of defendant or any expert management witness was offered to support the bare assertion that plaintiffs were properly considered "executives"; and where the refusal to hear the union experts is in conflict with the recommendations of the Administrator—was the Circuit Court correct in affirming the decision of the District Court?

Specifications of Error

The Circuit Court of Appeals erred:

1. In affirming the findings and conclusions of the District Court.

2. In holding that the findings and conclusions of the District Court were supported by substantial evidence of record.

3. In holding that all fourteen plaintiffs were exempt from the benefits of the overtime provisions of the Fair Labor Standards Act of 1938 as "executives".

4. In effectively reducing the burden of proof heretofore required of employers to exempt employees from overtime compensation benefits under the Fair Labor Standards Act of 1938.

5. In effectively voiding the authority of the Wage & Hour Administrator to formulate regulations binding upon trial court which rejected the recommendation of the Administrator to accept into evidence the testimony of qualified union officials as expert witnesses in helping in the determination of the "executive" status of employees.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. *The Circuit Court decided an important question of Federal law involving the construction of the Fair Labor Standards Act of 1938 (52 Stat. 1060); 29 U. S. C. pars. 201-209), which has not been, but should be settled by this Court.*

Although it has been decided by this Honorable Court that employees who are admittedly "foremen" may still not be "executives" so as to exempt them from the overtime benefits of the Fair Labor Standards Act of 1938; *Walling* v. *Sun Publishing Co.*, 140 F. (2d) 445 (affirmed 88 L. Ed. 1564); the question as to what characterizes a "foreman" so as to make him part of executive management has not yet been before this Court.

The plaintiffs in the present case deny that they were ever foremen. They contend they never were more than skilled machinists.

Certainly if the plaintiffs were not even foremen, then they were no part of management, and cannot be properly classified as executives.

In view of the general acceptance of the term "foremen" in the industry, it is submitted that the "turn" foremen were here the only "executives" in the machine shop.

The record discloses absolutely nothing which would indicate that the employer ever considered plaintiffs as supervisors, let alone executives.

It has long been the law, that even supervisors of the lowest grade in the management set-up can bind the employer by acts which constitute unfair labor practices—even where no express authority for the acts is shown: *New Idea, Inc.*, v. *N. L. R. B.*, No. 7631, Feb. 6, 1941, 117 F. (2d) 517; *Oughton* v. *N. L. R. B.*, No. 7336, Nov. 19, 1946, 118 F. (2d) 486; *Quaker State Oil Ref. Co. & Intl. Brother-*

hood Firemen, etc., 27 N. L. R. B. 212; *Heinz Co.* v. *N. L. R. B.,* 311 U. S. 514.

The N. L. R. B. has consistently held that "an employer owes to his employees an affirmative duty to restrain supervisory employees from engaging in union activity or in the formation or administration of company unions;" 2 Teller par. 299; *Ford Motor Co.,* 23 N. L. R. B. 28; *George W. Bollman Co. & Wool Hat Workers of United Hatters (AFL)* Feb. 17 1941, 29 N. L. R. B. 115; *Dupont* v. *N. L. R. B.,* 116 F. 2nd 388.

It is a well established practice for employers confronted with an N. L. R. B. election to instruct all supervisory or management employees not to interfere with or take part in the union organizing campaign and proceedings during the election. We believe that it is greatly significant that the employer here issued no instructions whatever to these plaintiffs during the steelworkers (C. I. O.) organizational drive and election in 1943 (Transcript of Test. 31).

The employer never called plaintiffs into any supervisory meetings (Transcript of test. 38-133-177-242-283-317-377-406-426-450-476-506-554-607).

The employer never confided company policies in the plaintiffs, (Transcript of test. 133-137 and similar testimony of all plaintiffs of record).

The employer never gave plaintiffs any authority to hire (Transcript of test. 134-178-237-315-376-404-425-449-475-506-553-606).

The employer never gave plaintiffs any authority to discharge (Transcript of test. 133-178 and similar testimony of all plaintiffs of record).

The employer never gave plaintiffs authority to set a production employee's rate or to change a rate (Transcript of test. 132-176 and similar testimony of all plaintiffs of record).

The employer never gave plaintiffs authority to keep merit ratings on other employees (Transcript of test. 134-177 and similar testimony of all plaintiffs of record).

The employer never instructed plaintiffs on personal policies or handling of men (Transcript of test. 133-177 and similar testimony of all plaintiffs of record).

The employer never authorized plaintiffs to discipline other employees (Transcript of test. 135-178 and similar testimony of all plaintiffs of record).

The plaintiffs were not endowed with authority to disapprove of an operator's production. Inspectors (hourly rated) actually had to approve the operators' work, and could reject the work of plaintiffs.

The plaintiffs had no jurisdiction over laborers or helpers or chainmen working with them (Transcript of test. 135-960-962-964).

The employer never gave the plaintiffs authority to promote or demote any other employees (Transcript of test. 134 and similar testimony of all plaintiffs of record).

The plaintiffs were never even told they were to be "foremen" when they were put on salary (Transcript of test. 132 and similar testimony of all plaintiffs of record).

The plaintiffs were never even told the rates of the operators in the group in which they worked (Transcript of test. 132 and similar testimony of all plaintiffs of record).

When some of the plaintiffs assumed authority, they were reprimanded (Transcript of test. 160-617-618).

Actually plaintiffs were skilled, technical aids to operators of machines on which they had been trained.

Plaintiffs' only function in the machine groups in which they worked, was to aid machine operators in reading blueprints, setting-up jobs, procuring tools or materials, and in operating machines, a substantial part of the work being manual in nature.

Actually, when the jobs were assigned to plaintiffs, they were kept on an hourly rate basis which indicates that the company actually considered plaintiffs in the same class as skilled production employees (Defendant's Exhibit Q).

The job duties were in no way changed when plaintiffs were placed on salary (Defendant's exhibits C through P.).

The plaintiffs never had knowledge of company methods of handling employee grievances, and were never given authority to settle grievances (Transcript of test. 132-137 and similar testimony of all plaintiffs on record).

The plaintiffs were actually under regular supervision themselves (Transcript of test. 85).

Hourly rated foremen had greater authority than plaintiffs (Transcript of test. 906-962-964) and they are not exempt under the Regulations, not being on salary.

The earnings of plaintiffs were for less than those of production employees, on the basis of the highest hourly rate of $1.71 proved in the case (Transcript of test. 664), plus time-and-one-half for overtime, in excess of two hours bonus daily, plus shift differentials.

The Plaintiffs Are Not Executives, Even Though Called "Foremen" by the Company

It is well established that a job title is not controlling in the determination of whether an employee is an executive under the Act.

The job duties determine the employee's status with respect to receiving benefit of the Act.

And "office manager-treasurer-director," who actually was the bookkeeper of the company, was held not to be exempt: *Lawley* v. *South*, 322 U. S. 746, 140 F. 2nd 439.

A chief engineer and superintendent of foremen was held non-exempt, even though he exercised many executive duties, and was on a monthly salary where a large percent-

age of his work was manual: *Wagner* v. *American Service Co.*, 58 F. Supp. 32.

Also held non-exempt generally, are "working foremen". In the case of *Walling* v. *Sun Publ. Co.*, 47 F. Supp. 180 (affd. later by U. S. Supreme Ct. . . .) even though the foremen had authority to hire and fire, where they were "working foremen" they were held non-exempt.

In the case of *Schmidt* v. *Emigrant Industrial Sav. Bank*, 148 F. 2nd Circ., a building superintendent, with 5 elevator operators, a porter and a night watchman under him, with authority to recommend hiring or firing and change status of employees, was held not exempt under the Act, because he also did manual work, oiling the elevator machinery, inspecting contacts, sprinkler system, valves, toilets, etc.

This case holds that all 6 elements of exemption "must" be shown (in the conjunctive) to exempt an employee from the act as an executive; the case follows: *Fanelli* v. *U. S. Gypsum Co.*, 2 Cir. 141 F. (2d) 216; *Helliwell* v. *Haberman*, 2 Cir. 140 2d 833; *Smith* v. *Porter*, 8 Cir. 143 F. (2d) 292.

The appropriateness of defining "bona fide executive" in the terms of one whose primary duty consists of management, who customarily and regularly directs the work of others, and who customarily and regularly exercised discretionary powers, is apparent without discussion. The general acceptance of this definition by the courts is evident from the host of decisions which have denied the exemption where the qualifications prescribed have not been satisfied.

Ralph Knight v. *Mantel*, 135 F. (2d) C. C. A. 8); *Helena-Glendale Ferry Co.* v. *Walling*, 132 F. (2d) 616 (C. C. A. 8); *Walling* v. *Stone*, 131 F. (2d) 461 (C. C. A. 7); *Corey* v. *Detroit Steel Corp.*, 6 Wage Hour Rept. 833 (E. D. Mich. 1943); *Shain* v. *Armour and Co.*, 6 Wage Hour Rept. 715 (W. D. Ky. 1943); *Cohn* v. *Decca Distributing Corp.*, 50 F. Supp. 270 (E. D. Pa. 1943); *Abram* v. *San Joaquin Cotton Oil Co.*, 49 F. Supp. 393 (S. D. Calif.); *Timberlake* v.

Day and Zimmerman, 6 Wage Hour Rept. 537 (S. D. Iowa 1943); *Cron* v. *Goodyear Tire Co.,* 49 F. Supp 1013 (M. D. Tenn.); *Porter* v. *Georgia Power and Light Co.,* M. D. Ga., Civil No. 94, decided May 1943; *Mabee* v. *White Plains Pub. Co. Inc.,* 6 Wage Hour Rept. 437 (Sup. Ct. N. Y. Westchester Co. 1943); *Walling* v. *Emery Wholesale Corp.,* 49 F. Supp. 192 (N. D. Ga.); *Buckley* v. *Rappaport,* 6 Wage Hour Rept. 154 (N. D. Ill. 1943); *Walling* v. *Cudahy Packing Co.,* 6 Wage Hour Rept. 65 (E. D. Tenn. 1942); *Walling* v. *Sun Pub. Co.,* 47 F. Supp. 180 (W. D. Tenn.); *Moss* v. *Postal Telegraph-Cable Co.,* 42 F. Supp. 807 (M. D. Ga.); *Kelley* v. *Yelow Cab Terminal Co.,* W. D. Ky., Civil No. 323, decided June 19, 1943; *Klotz* v. *Ippolito,* 40 F. Supp. 422 (S. D. Tex.); *Barker* v. *Georgia Power and Light Co.,* 5 Wage Hour Rept. 540 (M. D. Ga. 1942); *McClure* v. *Schulze Baking Co.,* 5 Wage Hour Rept. 53 (C. C. Ill., Winnebago Co. 1941); *Schneider* v. *Sports Vogue, 35 N. Y. S. Oil Co.,* 4 Wage Hour Rept. 274 (N. D. Tex. 1941); *Boylan* v. *Linden Mfg. Co.,* 4 Wage Hour Rept. 158 (C. C. Mich. Ingham Co., 1941).

In the present case the blue print and work card "directed" the work of the operators. This is generally admitted. There is absolutely no discretion or judgment reposed in plaintiffs in this regard.

The primary duty of plaintiffs was to help manually or otherwise any operator who required assistance in following the directions prepared by others.

Not a word of testimony appears showing any authority in plaintiffs to modify any blue print or work card. The contrary does appear, undenied. In short, no intellectual duties were ever assigned to or assumed by the plaintiffs.

As the district court said of the operation of radio transmitting equipment in *Walling* v. *Sun Publishing Co.,* 47 F. Supp. 180, affirmed 140 F. (2d) 445, this is "essentially a

mechanical task of a skilled nature." There, as here, the duties were not intellectual but were, in contrast, "skilled mechanical work."

The extent of manual labor performed by employees, however, is not the only factor to consider. If plaintiffs did no manual work they are still not executives under the act. "The mere fact that certain employees are prohibited from doing physical labor does not in itself make them executive employees exempt from wage and hour provisions since their status as executives depends upon other matters than that of labor performed and also upon observance by the employer and employee of the prohibition to labor. *Walling* v. *St. Mary's,* D. C. Pa. 1944, 57 F. Supp. 523.

The National Labor Relations Board has distinguished minor supervisory employees, such as straw bosses, lead-men, set-up men, etc., from supervisors "vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." Thus group leaders with authority to give instructions and to lay out work have been held to be non-management employees; *Pittsburgh Equitable Meter Co.,* 61 N. L. R. B .880; similarly held non-management were supervisors who are mere conduits for transmitting orders; *Richards Chemical Works,* 65 N. L. R. B. 14. Even persons who have the title of "foreman" or "assistant foremen" who have "no authority other than to keep production moving" have been held non-management: *Endicott-Johnson,* 67 N. L. R. B. 1342, 1347.

II. *The Circuit Court decided a Federal question in a manner in conflict with the applicable decisions in this Court in that it sustained the District Court's conclusions of law and fact which were in nowise supported by the evidence, contrary to the decisions of this Honorable Court in the cases of Mid-Continent Investment Co.* v. *Mercoid Corp., 320 U. S. 661; Automatic Maintenance Mach. Co.* v. *Precision Instrument Mfg. Co., 324 U. S. 806; Stern* v. *Harrison 152 Fed. 2d 521, cert. den. 66 S. Ct. 967, and other cases.*

Since the Courts are bound to accept the definitions of the Administrator; and since the expert testimony is acceptable to the Administrator for the purpose of applying the definitions more accurately, it is submitted that such testimony would be helpful to the Court as well as for this purpose; and the refusal of the trial judge to accept evidence of this type is certainly prejudicial to plaintiffs.

The Findings and Conclusions of the Trial Court Are Not Based upon Substantial Evidence

It is generally held that the office of the "findings of fact by a trial court sitting without a jury, is to distill from the evidence adduced at the trial of a disputed issue the pertinent facts which must be known by the court in order to enable it to determine and apply the relevant rules of law and thereupon to grant appropriate relief to the litigants. *Hartford-Empire Co.* v. *Shawkee Mfg. Co.*, C. C. A. Pa. 1944, 147 F. 2d 532.

Where facts are not in dispute, legal deductions and conclusions of law drawn by the District Court, while worthy of great consideration, are not binding on the Circuit Court of Appeals. *Stubbs* v. *Fulton Nat. Bank of Atlanta*, C. C. A. Ga. 1945, 146 F. 2d 558, Cert. den. 325 U. S. 864. In re

Chicago & N.W. Ry. Co., 110 F. 2d 425; *Crutcher* v. *Joyce*, C. C. A. N. M. 1945, 146 F. 2d 518.

Where the district judge on a non-jury case made ultimate findings without making detailed findings of fact, he erred. *Knapp* v. *Imperial Oil & Gas Products Co.*, C. C. A. W. Va. 1942, 130 F. 2d 1; *Brooks Bros.* v. *Brook Clothing of Ca.*, D. C. Cal. 1945, 5 F. R. D. 14.

A Circuit Court of Appeals is not bound by the findings of fact of a District Court where they are not supported by substantial evidence; neither is the appellate court bound by conclusions drawn from unsupported findings. *Mid-Continent Inv. Co.* v. *Mercoid Corp.*, C. C. A. Ill. 1943, 133 F. 2d 803, 320 U. S. 661; *Automotive Maintenance Machinery Co.* v. *Precision Instrument Mfg. Co.* C. C. A. Ill. 1944, 143 Fed 2d 332, 324 U. S. 806; *Stern* v. *Harrison*, C. C. A. Ill. 1945, 152 F. 2d 321, cert. den. 66 S. Ct. 967.

The learned Trial Judge failed to make specific findings with regard to each plaintiff on the several elements necessary to constitute each plaintiff an "executive" so as to be exempt from the benefits of overtime compensation under the Act.

It is respectfully submitted that not a single plaintiff was shown to possess all the qualifications required by the Administrative ruling. The several findings of fact refer to record testimony as to some but not all plaintiffs, on important elements which are absolutely necessary in every case.

Even were all the "executive" elements present in the collective testimony of the plaintiffs, it is submitted that unless all elements were affirmatively established as to *each* plaintiff, defendants have failed in their burden of proof to establish the exemption.

III. *The Circuit Court erred in affirming findings and conclusions of the District Court which in effect restrict the applicability and benefits beyond the intent of the Act and of the regulation of the Wage and Hour Administrator as declared in Sec. 541.1 of 29 Code of Federal Regulations, and contrary to the express principles declared by this Honorable Court in United States* v. *Darby, 312 U. S. 100, 109; Fleming* v. *A. B. Kirschbaum Co., 312 U. S. 517; and Phillips Co.* v. *Walling, 324 U. S. 490.*

The Fair Labor Standards Act is a remedial statute of general application. Its purpose is to establish basic wage and hour standards "for health, efficiency, and general well-being of workers "engaged in interstate commerce or in the production of goods for interstate commerce, Section 2(a); *United States* v. *Darby,* 312 U. S. 100, 109. Being "remedial legislation," the Act "should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended." *Piedmont & Northern Ry.* v. *Interstate Comm.,* 286 U. S. 299; *Spokane & Inland R. R. Co.* v. *United States,* 241 U. S. 344, 350; *Bowie* v. *Gonzalez,* 117 F. (2) 11, 16 (C. C. A. 1); *Fleming* v. *Palmer,* 123 F. (2) 749, 762 (C. C. A. 1), certiorari denied, 316 U. S. 662; *Fleming* v. *Hawkeye Pearl Button Co.,* 113 F. (2d) 52, 56 (C. C. A. 8); *Consolidated Timber Co.* v. *Womack,* 132 F. (2d) 101, 106 (C. C. A. 9); *Fleming* v. *A. B. Kirschbaum Co.,* 124 F. (2d) 567, 572 (C. C. A. 3), aff'd 316 U. S. 517.

This principle was affirmed in *Phillips Co.* v. *Walling* (Decided March 26, 1945), 324 U. S. 490 where the Court said:

> "The Fair Labor Standards Act was designed to extend the frontiers of social progress, by insuring to all our able-bodied working men and women a fair day's

> pay for a fair day's work''—Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress.''

Applying the principles thus laid down to the case at bar, where the *undenied* proof negatives any inferences or insinuations of intended authority over other employees, it is inconceivable that defendants could be sincere in referring to plaintiffs as ''executives'' or ''administrative officers,'' merely because they were loosely referred to as ''foremen.''

Certainly plaintiffs have met the burden of proof required of them to establish their right to participate in the benefits of the Act, even without a ''liberal'' construction thereof.

Conversely, it is submitted that defendants, even were they not required to prove an exemption by a ''clear preponderance of the evidence,'' under a narrow and strict construction of the terms ''executive'' or ''administrative'' officer, have *failed to deny the lack of executive authority in plaintiffs.*

Even where there is control over other employees, the courts have denied the claimed exemption. In *Moss* v. *Postal Telegraph-Cable Co.*, 42 F. Supp. 807 (M. D. Ga.), the manager of a branch office who directed the work of other employees but had no authority to hire and fire was held not an executive. See also, *Timberlake* v. *Day & Zimmerman, Inc.*, 49 F .Supp. 28 (S. D. Iowa) (captain of plant guards); *Shain* v. *Armour & Co.*, 50 F. Supp. 907 (W. D. Ky.) (''key men'' or working foremen); *Corey* v. *Detroit Steel Corp.*, 52 F. Supp. 138 (E. D. Mich.) (night superintendent of maintenance); *Fellabaum* v. *Swift & Co.*, 54 F. Supp. 353 (N. D. Ohio) (shipping clerk supervising intra-

state distribution of meat packing plant); *Walling* v. *St. Marys Sewer Pipe Co.*, 56 F. Supp. 345 (W. D. Pa.) (kiln foremen); *Simmons* v. *Straight Improvement Co., Inc.*, 7 Wage Hour Rept. 1060 (S. D. N. Y.) (superintendent of loft building); *Distelhorst* v. *Day & Zimmerman*, 58 F. Supp. 334 (S. D. Iowa) (building foremen, chief clerk, yard foremen); *Pakarinen* v. *Butler Bros.*, 16 N. W. (2d) 769 (Sup. St. Minn.) (shift boss of mine).

Certainly the defendant cannot rely on the testimony of record to establish the "strict" or "narrow" definitions of "bona fide executive" or "administrative capacity." It is well established that all six elements of the restrictive definition "bona fide executive" must be proved by the "clear preponderance of the testimony;" yet the record is devoid of any proof that plaintiffs' "primary duty consists of the management" or any "recognized department or subdivision thereof," as required by the very 1st of the six restrictive elements of the definition. On the contrary, the defendant has even failed to establish that plaintiffs were assigned to a "recognized"—subdivision of a department, as required (Transcript of test. 63-64-65-66).

Element (D) of the Administrator's definition, was not only proved by defendant, but as the record stands, the plaintiffs have definitely and affirmatively negatived the possession of "discretionary" powers; while the defendant's general superintendent, Mr. J. R. Berg, called as for cross-examination, further strengthen this position of plaintiffs by showing in what other officers all authority and discretion were reposed.

As to element (B) of the definition, the evidence is overwhelming that the only time plaintiffs were called upon to "direct" the work of other employees is when they ran into difficulty. Certainly this is not the measure of direction termed "customarily and regularly" by the definition.

We believe that plaintiffs have positively established a lack of authority to hire, fire, or recommend same, or authority to advance and promote or effect other changes in status of employees, as required by element (C) of the definition. Their authority as to recommendations was no different than that of a regular machine operator, according to the testimony of Mr. Berg, defendant's general superintendent. (Transcript of test. 70)

The positive, undenied proof of record dispels any doubt that plaintiffs actually worked from 25% to 100% of the time on work similar in nature to that of other employees. Therefore element (F) of the definition of executive is not available to defendant.

In short, faced with the burden of establishing positively all six elements of the definition by a "clear preponderance of the testimony," defendant's case has failed to establish five out of the six elements necessary to exempt an employee as a "bona fide executive."

Of course, the burden is on the employer to prove an exemption "by the clear preponderance of the testimony:" *Smith* v. *Porter*, 143, F. 2nd 292; *Cohn* v. *Decca*, 50 F. Supp. 270; *Helliwell* v. *Haberman*, 140 F. (2d) 833; *Parkarinen* v. *Butler*.

The employer must show all 6 conditions present before claiming "executive" exemptions: *Fanelli* v. *U. S. Gypsum Co.* 141 F. (2d) 216.

IV. *The Circuit Court erred in finding that the record supported the findings and conclusions of the District Court declaring plaintiffs to be "executives" exempt from overtime benfits of the Fair Labor Standards Act of 1938, as such term is defined by the Wage and Hour Administrator, 29 Code of Federal Regulations Sec. 541.1, 5 F. R. 4077.*

The 7th finding of fact by the trial court is as follows:

> "During the foregoing periods of time the recommendations and suggestions of the plaintiffs as to advancement and promotion of other employees were given particular weight. (N. T. 134, 351, 531-33, 570)"

The 9th finding of fact by the trial court is as follows:

> "During the foregoing periods of time each of the plaintiffs customarily and regularly exercised discretionary powers. (N. T. 127-8, 192, 156, 240, page references in Requests for Findings 5-8).

Each of the findings refers to *all* plaintiffs (and each finding is absolutely necessary to support the conclusion that plaintiffs are executives); yet the court refers to testimony of only four of the fourteen plaintiffs in each instance; and nothing in the record supports the findings, as to the remaining ten plaintiffs in each instance.

The Circuit Court disregarded the absence of any evidence of record to support the 7th and 9th findings of fact in the case of 10 plaintiffs in each instance, and affirmed the findings of the District Court as if there were "substantial evidence" in support of the findings.

V. *The decision of the Circuit Court is in conflict with the decisions of other Circuit Courts and with the applicable decisions of this Honorable Court in defining "executives" who cannot claim the benefits of overtime compensation under the Fair Labor Standards Act of 1938.*

The cases and argument relied upon are covered under Argument III in this brief.

VI. *The Circuit Court erred in finding that there is "substantial evidence" in the record to support the District Court's finding that plaintiffs' primary duty consisted of the management of a "customarily recognized department or subdivision thereof."*

Contrary to the 5th finding of fact by the trial court, sustained by the Circuit Court, the "departments" were "managed" by other employees on the same shift with plaintiffs.

All witnesses agreed that the "shift," "turn", or "general" machine shop foreman were actually "in charge" of the department.

Under the testimony of defendant's witness Berg, General Superintendent of the machine shop, the shift foremen were endowed with all recognized attributes of "foremen" —they could discharge, suspend, discipline or transfer employees; they were called into supervisory meetings with management; company policies were discussed with them; they could and did grant increases; they were customarily and regularly in charge of the personnel and work of the employees of the machine shop on their shifts—in short, they "managed" the department in the truest sense of the word. These are the men (Kraus, Machesky, Yoezie) whom management entrusted with the obligations of executing company policies in the department. These are the men

who are the "Executives" exempted from the benefits of the act.

It is noteworthy that:

A. NOT A SINGLE ONE OF THESE MEN WAS OFFERED AS WITNESS TO SUPPORT THE BARE ASSERTION THAT "RECOMMENDATIONS" TO THEM BY PLAINTIFFS WOULD HAVE "PARTICULAR WEIGHT."

B. ALTHOUGH PRESENT IN THE COURTROOM THROUGHOUT THE TESTIMONY OF PLAINTIFFS, SHIFT FOREMAN KRAUS FAILED TO TAKE THE STAND TO DENY THE POSITIVE AVERMENTS BY PLAINTIFFS THAT HE NEVER EVEN TOLD THEM THEY WERE TO BE CALLED "FOREMEN" WHEN THEY WERE ASSIGNED TO THEIR JOBS.

In view of these facts, it is respectfully submitted that the Honorable Court may assume that had the witnesses been called, their testimony would have corroborated plaintiffs.

VII. *The Circuit Court erred in finding that there is "substantial evidence" in the record to support the District Court's finding that plaintiffs "customarily and regularly direct the work of other employees therein."*

The 5th finding of fact, has been previously referred to under Argument VI.

VIII. *The Circuit Court erred in finding that there is "substantial evidence in the record to support the District Court's finding that plaintiffs' "recommendations as to discharge or advancement."*

The 7th finding of fact, unsupported as to 10 of the 14 plaintiffs, has been previously referred to under Argument IV.

IX. *The Circuit Court erred in finding that there is "substantial evidence" in the record to support the District Court's finding that plaintiffs did "customarily and regularly exercise discretionary powers."*

The 9th finding of fact, unsupported as to 10 of the 14 plaintiffs, has been previously referred to under Argument IV.

X. *The Circuit Court erred in finding that there is "substantial evidence" to support the District Court's findings that none of the plaintiffs did work of the "same nature as that performed by non-exempt employees" more than twenty per cent of the time worked by the non-exempt employees in a work-week.*

The plaintiffs performed work of a similar character to production employees from to 2 to 8 hours per day (Transcript of test. Gill—130; Wilson—182; Wilson—242; Carlson—270; Ely—287½; Daugherty—320; Mayer—382; Britton—410-11; Menking—430; Petrichek—456; Weir—479; Hornfeck—503-4; O'Shell—547-8; Hill—600).

Defendant admits that from 30 to 40 hours a month plaintiffs actually worked machines (Transcript of test. 73); while more time was admittedly spent in bringing tools, jigs, drawings and other devices to the operators (Transcript of test. 73).

Under the circumstances, even were plaintiffs actually given other executive authority as foremen, they would still not be exempt from the Act under Sec. F of the Regulation definition of "executive."

XI. *The Circuit Court's decision relieves trial courts from the obligation imposed by the Administrator to consider union practices in determining executive status of employees, contrary to the decisions of this Honorable Court in construing the effectiveness of administrative regulations in United States v. Bush & Co., 310 U. S. 371, 380; Gray v. Powell, 314 U. S. 402; and in conflict with the decisions of other Circuit Courts, such as Knight v. Mantel, 135 F. (2d) 514 (C. C. A. 8); Joseph v. Ray, 139 F. (2d) 409 (C. C. A. 10); Lawley & Son Corp. v. South, 140 F. (2d) 439 (C. C. A. 1).*

In determining whether or not an employee is in a "management" or "labor" status, the Wage and Hour administrator has considered the union practice with regard to the employee in question.

In the official Department of Labor Wage and Hour Division's Report and Recommendations of the Presiding Officer on "Executive, Administrative, Professional • • • Redefined," effective October 24, 1940, the Administrator rules that:

> "It should be noted, of course, that for obvious reasons labor unions normally exclude from their membership and from the provisions of their collective bargaining agreements persons employed in a bona fide executive capacity. Frequently, union agreements also exclude other employees who have a direct relationship to management even though it be of an admittedly non-executive type. For this and other reasons union practices constitute a useful guide but cannot be taken as determinative in the problem of definition."

Plaintiffs' offers to show organized labor experts' views on the status of plaintiffs were rejected by the learned Trial Court, on objection by counsel for defendants (Transcript of test. 654-658-673-674). The offers were made for no other

purpose than that for which they would have been accepted by the Administrator in attempting to arrive at a decision concerning the management status of an employee.

Since the Courts are bound to accept the definitions of the Administrator; and since the expert testimony is acceptable to the Administrator for the purpose of applying the definitions more accurately, it is submitted that such testimony would be helpful to the Court as well for this purpose; and the refusal of the trial judge to accept evidence of this type is certainly prejudicial to plaintiffs.

WHEREFORE, it is respectfully prayed that this Honorable Court may issue a writ of certiorari ordering that this record may be certified to this Honorable Court for its consideration and review.

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